IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

AUGUST 8, 2003

CASE NO.: 2D02-1667
L.T. No.: 00-5401 DIV.D

R.J. Reynolds Tobacco Company,	v.	Florence Kenyon, As Personal Representative
Appellant/Petitioner(s)		Appellee/Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion for rehearing, rehearing en banc, certification and issuance of written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

/s/
James Birkhold
Clerk

NOT FINAL UNTIL TIME EXPIRES TO FILE
REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

R.J. REYNOLDS TOBACCO COMPANY, Appellant, v. FLORENCE KENYON, as Personal Representative of the Estate of Floyd J. Kenyon, Sr., Appellee.	)	Case No. 2D02-1667

Opinion filed May 30, 2003.

Appeal from the Circuit Court for Hillsborough County; Herbert J. Baumann, Jr., Judge.

PER CURIAM.

Affirmed.

SALCINES, DAVIS, and COVINGTON, JJ., Concur.

IN THE CIRCUIT COURT FOR THE 13th JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
GENERAL CIVIL DIVISION

FLOYD J. KENYON, SR. and
FLORENCE KENYON, his wife,

Plaintiffs,

Case No. 00-05401
Div. D

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE having been tried to a jury and on December 12, 2001, a verdict having been rendered finding in favor of Plaintiff, Floyd J. Kenyon, and against Defendant, R.J. Reynolds Tobacco Company, and finding that Plaintiff, Florence Kenyon, is not entitled to damages,

IT IS HEREBY ORDERED AND ADJUDGED that final judgment for compensatory damages is hereby entered in favor of Plaintiff, Floyd J. Kenyon, Social Security No. 110-20-0431, most recently located at 2238 Sonoma Drive West, Nokomis, Florida 34275, against Defendant R.J. Reynolds Tobacco Company, headquartered at 401 N. Main St., Winston Salem, North Carolina 27102, in the sum of $165,000.00 (One Hundred and Sixty-Five Thousand Dollars and No Cents). Said sum shall bear interest at the rate of eleven percent (11%) per annum from the date thereof, all for which let execution issue.

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff, Florence Kenyon, Social Security No. 099-24-3410, most recently located at 2238 Sonoma Drive West, Nokomis, Florida 34275, take nothing by this action.

IT IS FURTHER ORDERED AND ADJUDGED that jurisdiction over this cause be, and the same is, hereby reserved to determine the amount, if any, of attorneys' fees and costs, including those incurred in any post-judgment proceedings.

DONE AND ORDERED this ___ day of December, 2001, in Tampa, Hillsborough County, Florida.

/s/
Herbert J. Baumann, Jr.
Circuit Court Judge

Signed 12/18/01

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

FLOYD J. KENYON, SR. and FLORENCE KENYON, his wife,	)	
Plaintiffs,	)	Case No. 00-5401
	)	DIVISION D
v.	)	
R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,	)	
Defendant.	)	

VERDICT FORM

The Court has instructed the jury on the law. Based on those instructions and the evidence in this case, please answer the following questions:

1.A. Was there negligence on the part of Defendant R.J. Reynolds Tobacco Company, for not providing adequate health warnings to Plaintiff Floyd Kenyon prior to July 1, 1969, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes _____ No ___√___

1.B. Was there negligence on the part of Defendant R.J. Reynolds Tobacco Company for failing to exercise reasonable care in the design of its products, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes _____ No ___√___

Please proceed to Question 2.A.

2.A. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defective for not providing adequate health warnings to Plaintiff Floyd Kenyon prior to July 1, 1969, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes _____ No ___√___

2.B. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defectively designed, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?

Yes ___√___ No _____

Please proceed to the next page.

If your answers to all of the above are "No," your verdict is for Defendant R.J. Reynolds Tobacco Company and you should proceed no further except to sign and date your verdict and return it to the courtroom.

If you answered "Yes" to any of the above questions please answer all the remaining questions on this Verdict Form.

3. What is the amount of any damages sustained by Plaintiff Floyd Kenyon for medical expenses in the past and medical expenses to be sustained in future years?

$ $165,000.00

4. What is the amount of any damages sustained by Plaintiff Floyd Kenyon for pain and suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect or loss of capacity for the enjoyment of life in the past and to be sustained in the future (not including damages in number 3)?

Floyd Kenyon $ 0

5. What is the amount of any loss by Plaintiff Florence Kenyon of the services, comfort, society and attention of Plaintiff Floyd Kenyon in the past and in the future, by reason of her husband's injury?

Florence Kenyon $ 0

6. Under the circumstances in this case, state whether punitive damages are warranted against Defendant R.J. Reynolds Tobacco Company?

Yes _____ No √

SO SAY WE ALL THIS 12 day of December, 2001.

/s/
Foreperson

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

FLOYD J. KENYON, SR. and FLORENCE KENYON, his wife,	:	
Plaintiffs,	:	CASE NO. 00-5401 DIVISION D
v.	:	
R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,	:	
Defendant.	:	

ORDER ON DEFENDANT R.J. REYNOLDS TOBACCO COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON PREEMPTION

THIS MATTER having come before the Court on October 9, 2001, upon Defendant R.J. Reynolds Tobacco Company's Motion for Partial Summary Judgment Based on Preemption, and the Court having heard argument of counsel, and being fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's motion for partial summary judgment is granted as to Plaintiffs' post-1969 negligence and strict liability claims for failure to warn, Plaintiffs' post-1969 neutralization claims, as well as Plaintiffs' post-1969 conspiracy to commit fraud through concealment claims because they allege a duty to warn beyond that imposed by the Federal Cigarette Labeling and Advertising Act.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida on this ___ day of October, 2001.

/s/
Herbert J. Baumann
Circuit Court Judge

October 25, 2001

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION NO. 00-5401, DIVISION D

FLOYD J. KENYON, SR. and
FLORENCE KENYON, his wife,

Plaintiffs,

v.

R.J. REYNOLDS TOBACCO
COMPANY, a foreign corporation,

Defendant.

JURY INSTRUCTIONS

Members of the jury, I shall now instruct you on the law you must follow in reaching your verdict. It is your duty as jurors to decide the issues, and only these issues, that I submit for determination by your verdict. In reaching your verdict, you should consider and weigh the evidence, decide the disputed issues of fact, and apply the law on which I instruct you, to the facts as you find them from the evidence.

* * *

STRICT LIABILITY CLAIM

The issues for your determination on the strict liability claim of Plaintiffs Floyd Kenyon and Florence Kenyon against Defendant R.J. Reynolds Tobacco Company are:

A. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defective for not providing adequate health warnings to Plaintiff Floyd Kenyon prior to July 1,

1969, which was a legal cause of damage to Plaintiffs Floyd Kenyon and Florence Kenyon?; and

B. Were the Camel and/or Salem cigarettes manufactured by Defendant R.J. Reynolds Tobacco Company defectively designed, which was a legal cause of injury to Plaintiffs Floyd Kenyon and Florence Kenyon?

A product is defective if, by reason of its design, the product is in a condition unreasonably dangerous to the user, and the product is expected to and does reach the user without substantial change affecting that condition. As to determining an unreasonably dangerous design, a product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer. The product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer at the time, with the ordinary knowledge common to the community as to its characteristics.

A product may also be unreasonably dangerous if the risk of danger in the design outweighs the benefits.

In determining whether the risk of danger outweighs the benefits, you must consider the following factors: (1) the usefulness and desirability of the product; (2) the availability of other and safer products to meet the same need; (3) the likelihood of injury and its probable seriousness; (4) the obviousness of the danger; (5) common knowledge and normal public expectation of danger (particularly for established products); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and, (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

As such, in this case, in determining whether the risk of danger in the design outweighs the benefits of Camel (unfiltered) or Salem (filtered) cigarettes, you must consider: (1) whether the alleged injuries Plaintiff Floyd Kenyon sustained as a result of the challenged design for Camel (unfiltered) or Salem (filtered) cigarettes would have been avoided, or less severe, had Defendant R.J. Reynolds Tobacco Company used a feasible and available alternative design; (2) whether the enhanced danger posed by the challenged design outweighed the added cost, if any, to Defendant R.J. Reynolds Tobacco Company; (3) whether Plaintiff Floyd Kenyon would have used the product employing the alternative design instead of the products that he did smoke; and (4) whether Plaintiff Floyd Kenyon's injuries would have been avoided if he had used the product with this alternative design.

* * *

A defect in a product is a legal cause of injury if it directly and in natural and continuous sequence produces or contributes substantially to producing such injury so that it can reasonably be said that, but for the defect, the injury would not have occurred. In order to be regarded as a legal cause of loss, injury, or damage, the defective design need not be the only cause. A defect may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another or some other cause if such other cause occurs at the same time the defect had its effect and if the defect contributes substantially to producing such loss, injury, or damage.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
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TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	22 February 2002
TIME:	Commencing at 2:25 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

MS. PARKER: Let me pull up the verdict form and just very briefly remind the Court what happened and where we are.

We had the trial. The jury deliberated for two days, and they got it right on everything except one question. They came back with a defense verdict on negligence failure to warn, negligence design defect, strict liability failure to warn. They found no punitive damages. They found no loss of consortium. They got hung up on this one question, 2(b), and that is the strict liability design defect issue, and that's what I want to spend my time on today.

* * *

So, that leads to pre-emption. I won't spend a lot of time on this, because I know Your Honor has heard argument on it before; but briefly, it all started with the United States Supreme Court back in 2000 under the [Geier] case. That's where there was a products liability case against the manufacturer of a car, against Honda; and the plaintiff said, "Well, you should have had an air bag," and Honda came back and said, "Well, the law says you can either have a shoulder belt, a lap belt, or an air bag, one of the three."

And this was—but there was a state tort law that said, "No. You can recover—the plaintiff can recover for lack of an air bag."

And the United States Supreme Court said, "No. If there's a federal law that addresses the issue, a state cannot come forward and have tort liability that's in violation of the federal law," and that was again in the context of a car case.

That same year, in FDA vs. Brown & Williamson, where the Supreme Court of the United States said that Congress has addressed this issue—this exact issue that we heard in the trial here on six occasions since 1965 and that Congress

was well aware of the adverse health consequences, as well as pharmacological effects of nicotine; but, nevertheless, Congress has said—the Supreme Court acknowledged cigarettes are a lawful product despite those problems unless there's a design issue.

And that leads us back to the first point that we made. The Insolia case is the only case—we've looked every which way, and Insolia is the only case that's addressed that since FDA v. Brown & Williamson. I believe the issue there's a pipeline, but it has not been cited by other appellate courts.

But Insolia said one thing: Congress gives express authority to the state, and you can't—so, it's error not to give our proposed jury charge on this issue.

And we asked for that jury charge again, and it comes straight back to Question 2(b). Congress and the United State Supreme Court said the only proper basis for liability is if there is some alternate design that would have prevented the injury. You can't have liability just because smoking cigarettes may cause lung cancer. You can't have liability just because smoking cigarettes may have pharmacological effects. That's not enough under the Supreme Court case law.

And [the] only thing that Mr. Acosta has said every time we've argued this is, "Well"—and actually, I think it's Mr. Maxwell who argued this—" Well, Carter came out. The United States Supreme Court denied cert. in Carter and FDA vs. Brown & Williamson. So, that means this whole conflict pre-emption doesn't mean a thing in Florida."

Your Honor, I have the cert. petition. I'll be glad to file it if Your Honor wants me to. Carter did not raise this issue. It was not raised, because the Supreme Court case hadn't come out at the time. So, the fact that the Florida State Supreme Court denied cert. in Carter, that is before this decision came out in FDA vs. Brown & Williamson. It wasn't raised.

And here's what Your Honor said at trial: Your Honor said, "I appreciate argument. I appreciate it down the road, but I won't give that instruction," and that's where we are. It all comes back to that Question 2(b) on the verdict form.

* * *

THE COURT: I—I'll—I do have some questions. I want to give Mr. Acosta an opportunity to respond. I can ask some—

MS. PARKER: Thank you.

THE COURT: And I can ask some questions.

Do I have—I do think some of these issues are interesting. I think ultimately the Second DCA is going to wind up addressing them on somebody's behalf, some of these issues.

* * *

MR. ACOSTA: Now, the conflict pre-emption point that she raised, first of all, none of the cases that she cited overruled Cippolone, a U.S. Supreme Court case. I have a copy of Cippolone, if you'd like.

But Cippolone is still the law. It's still the law. The Florida Supreme Court in Carter read Cippolone, and the law of Florida today is that we can go forward the way that we have and the way that we did. And until the U.S. Supreme Court overrules Cippolone, that's the law; and only claims for failure to warn that are—or claims that would suggest that the warnings after 1970 were inadequate are precluded.

And Carter specifically held that there was—there was lots of other evidence post-'70 that was admissible and relevant regarding other kinds of statements that were made in terms of their research practices and in terms of their testing that they did or didn't do. Those things were relevant and permitted under Cippolone, according to the Florida Supreme Court and according to Cippolone itself.

Essentially, what Reynolds is now arguing is that they should have some sort of sovereign immunity because Congress said you could sell a cigarette; but there's a lot more to it than just the fact it might have been legal to sell them. They did other things that were tortious, and that's what we had to prove. We didn't prove our case simply on the basis that they were liable because they sold cigarettes. We had a lot of other elements to prove, and we proved it.

* * *

THE COURT: Let me—I am satisfied that the jury instructions that were given were appropriate. So, from the standpoint there's an issue raised with regard to jury instructions, that's—

MS. PARKER: I'll answer any questions Your Honor has. Otherwise, I would like to respond on the other point.

THE COURT: But let me—you can respond, but let's—let me focus in a little bit. Undoubtedly the pre-emption issue is an appropriate appellate issue—appropriate issue for any court, but it's appropriate to be addressed at some point in time.

But it does seem to me that there continues to be, assuming—one assumes the finding by this jury is correct. You raised a lot of issues. It seems to me that still the design issue is an open issue notwithstanding the recent Supreme Court cases.

MS. PARKER: Your Honor, I totally agree; and there has been—I feel like I'm arguing apples and oranges here. I totally agree. Cippolone is still good law. I totally agree that in the state of Florida you can have a cause of action for strict liability design defect, but only if there is a feasible, safer alternative design.

THE COURT: Right.

MS. PARKER: That's the problem.

THE COURT: And that's a separate issue.

MS. PARKER: No, Your Honor. That is the conflict pre-emption issue. Conflict pre-emption says you cannot have state tort liability for something that the federal government has declared lawful. What the federal government has declared lawful is selling cigarettes that may cause—may have health consequences and may have pharmacological effects.

What that whole FDA vs. Brown & Williamson—that case—what that leaves open, what it says is still good law, is Cippolone; is having a cause of action in state law for design defect if the plaintiff can prove there's a feasible, safe alternative design. And that gets us back to Question 2(b). That's what we don't have here.

So, I'm not arguing that Cippolone should be thrown out. I'm saying simply conflict pre-emption means you cannot have liability unless that is the basis, unless the basis is a feasible, safer alternative design.

And Mr. Acosta has still not said what that evidence is. You know, if this goes up on appeal right now, there's still not one articulation by Mr. Acosta.

He said, "Oh, well there's plenty of evidence. Plenty of evidence."

What is it? Today is the day. What is it? And there isn't any. I mean, there's no way around that. There's just no way around that.

The—I do want to say this about the jury charges, and I won't belabor it. There are two issues; and one issue—with respect to the jury charges on this Question 2(b), one issue is the jury charge on the test, risk utility or strict liability—I'm sorry, risk utility or consumer expectations. Okay? That's one jury charge issue.

The other jury-charge issue is feasible, safer alternative design, and that's what we asked for and we believe is a correct statement.

If you could pull up Taylor and all that.

That is the law in Florida.

THE COURT: Well, they disagree with you.

MS. PARKER: Your Honor has already charged the jury on that.

THE COURT: I charged the jury on that. I was comfortable with the charge. I understand.

MS. PARKER: We're past that point. So, if that's the law as Your Honor has charged the jury, the plaintiff has to show he would have used it and it would have avoided his injury. And there is not a shred of evidence. There is no inference. There is nothing on that topic. Nothing.

I want to address—I won't go into the—except to let me say this one thing: I won't go into the issue of whether we asked for the jury charge or not.

THE COURT: That's going to be on the record, you know, and it doesn't matter.

MS. PARKER: It is.

THE COURT: It doesn't matter for purposes of what I'm doing today, because as I again—you know, there was an extensive—we spent several hours regarding jury instructions, and there's going to be a variety of argument on the instructions; and frankly, as I recall, nobody was—no one was particularly happy with all parts of the jury instruction. I mean, you had issues; the plaintiffs had issues. I'm still comfortable with the jury instructions. And if somebody looks at it one day, they can express their satisfaction or dissatisfaction.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
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TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	10th December 2001
TIME:	Commencing at 9:06 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

MR. ACOSTA: Now, this is an important instruction: "A product is defective if it is unreasonably dangerous when placed in the hands of the consumer without a warning." That's the law you are to follow, and I want you to think—let me rephrase that.

You should think of two things that Dr. Townsend said: One, a cigarette is inherently dangerous; and, two, it's not safe for its intended use. A cigarette is not safe for its intended use.

If it's inherently dangerous and not fit for its intended use, it's unreasonably dangerous and defective. That's why this word "defective" people—the definition is a little challenging. This is the definition of "defect." It doesn't mean that the cigarette has a rock in it that shouldn't be there. That's—if it—if it is unreasonably dangerous and doesn't have a warning, it's defective.

We know it didn't have a warning. Dr. Townsend said there's no such thing as a safe cigarette. He said it was inherently dangerous, and he said it's not fit for its intended use. So, there you go. This weighs in favor of the plaintiff.

* * *

MR. ACOSTA: And let's got [sic] to strict liability real quick. The first prong of strict liability—there's two issues here. It was whether it was defective for not providing health warnings. It's similar to the other one, but there's a different test that you use rather than the negligence test—and by the way, you're going to get a copy of these, I think, to take back in the jury room with you so you can read these over again.

And there's two parts to this one just like in the negligence claim. The second one is whether it was defectively designed.

And then you'll be determining—there is a two-part test, because it can be defective under this kind of liability for two different reasons. Does the product meet the consumer expectations for the product? If consumers thought it was safe and it wasn't, then it didn't meet their expectations. So, it would be defective under—under this definition.

And this is how you would read it, "As to determining an unreasonably dangerous design, a product is unreasonably dangerous because of its design if the product fails to perform as an ordinary consumer would expect when used as intended."

Well, that sort of means that today you could look at it and say, "Well, it performs as intended today because everybody knows that it's dangerous." Back then it didn't. So, back then the same cigarette could be defective 30 years ago, but not today.

We're asking you to find that cigarettes that Mr. Kenyon smoked in the '40s, '50s, '60s, and '70s were defective in the way they were designed, because they don't meet this test.

The other test that's used is a lot more complicated, even though it looks simple when you first read it. "A product may also be unreasonably dangerous if the risk of danger outweighs the benefit."

Well, so, you have to say, "What's the benefit of a cigarette?" Most people tell you people don't smoke—don't ever tell you. What's the benefit of that? There isn't any.

So the risk of danger would outweigh—it would simply outweigh whatever benefit you get from the cigarette. But then you have to consider a bunch of factors. And although you must consider them, it doesn't mean that any of them are particularly binding. You just have to consider them in determining whether or not the risk of danger in the design outweighs the benefit. We believe that the risk of danger does under either test.

* * *

MR. ACOSTA: The whole idea there was that it was nicotine that they sold. It was nicotine that made people smoke. And he thought up alternative products in the late '60s, knowing that they could never make a healthy cigarette.

Knew it back then, but they didn't do anything about it because they wanted to stay in the conventional cigarette business as long as they could.

They don't even start on the Premier until 1982. And then that goes bust. Now it's ten years or 12 years since then, and there's no Eclipse on the market that you can buy down at the 711. It's not there.

These are drug delivery devices. You may remember the patent, the patent application information. They're drug delivery devices, that's what they are.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	7 December 2001
TIME:	Commencing at 1:20 p.m.
REPORTED BY:	Mary Elizabeth Baker, RPR Notary Public, State of Florida

* * *

MS. PARKER: All right. I have one just kind of big picture objection that I just need to cite for the record again and that is conflict pre-emption, which I've already mentioned earlier.

THE COURT: Right.

MS. PARKER: We think that should be a proper test and I just want to state that again for the record. I understand Your Honor's prior ruling.

THE COURT: I've ruled, Okay.

* * *

THE COURT: So 3 would read: "Whether plaintiff, Floyd Kenyon, would have used—used the product employing the alternate design instead of the products that he did smoke."

MR. ACOSTA: Judge, I still—I don't understand why the plaintiff would even have to use—let's pretend that—it's a drug. And you take Phen-Fen or something. And you find out later that Phen-Fen causes heart murmurs and heart valve problems. What if the plaintiff just wouldn't have used it at all if he knew it was defective. Certainly that is his option, but to require him to have to use some other product instead is—I think putting a—a completely and totally unfair burden on the plaintiff.

THE COURT: Well, but as I see it, the issue on alternative design is, I mean, what you're trying to establish liability for is the failure of the defendant to make available other design options that you contend could have been available for—

MR. ACOSTA: We don't have any claim at all for that. We did not claim—

THE COURT: You're claiming your client was injured.

MR. ACOSTA: We're claiming the client was injured by a defective product. We don't have a claim that they should have made some alternative design product. That's—what—they—they claim that as a defense that they couldn't make an alternative design, and then now they're trying—

THE COURT: No, I understand there's going to be factual issues that are going to be addressed in closing on—on design, but you're going to suggest, if I'm not mistaken, that they could have—they could have brought to market additional, different designs, correct?

MR. ACOSTA: What we contend is that they should have cured the defect in the products that he smoked. And—

THE COURT: I understand.

MR. ACOSTA: —and that they shouldn't have been available to him in the form that they were in. Period. That's what the plaintiff contends, that they were defective and reasonably dangerous in that sense. Now they claim, well, you know, we couldn't have made them any other way or something like that. That's their defense.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	7 December 2001
TIME:	Commencing at 9:00 a.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

THE COURT: Any others on negligence?

MS. PARKER: Can we have just a moment to go through 'em?

THE COURT: Sure.

(Pause.)

MS. PARKER: Number 17—Defendant's Number 17, "Cigarettes are a legal product."

THE COURT: Yeah, I—I will not give that. I think it's—I think the instruction, I think, as it stands sufficiently addresses that issue.

MS. PARKER: Your Honor, this really goes to—I feel like I need to—

THE COURT: The case law, I understand. You can articulate that.

MS. PARKER: On a separate issue, I feel like I need to go ahead and mention this here, as well as the strict liability conflict pre-emption issue. I know Your Honor's heard us argue that before, but we have a requested charge on conflict pre-emption, and that should be the overarching standard under a recent Florida Supreme Court case that came out after Carter came out. So, I want to make sure Your Honor understands that is a request that we have.

THE COURT: And I appreciate the legal arguments you raised in that regard. I think that the way the instruction is currently crafted, articulating the standards under state law by its very nature recognizes the fact that products manufactured were manufactured legally by your claim [sic]; and I see no other way to address that issue other than to give the instructions as they're written.

So, I appreciate the argument. I appreciate it down the road, but I won't give that instruction. I'll leave the instruction as it is.

MR. MAXWELL: Your Honor, just for the record, on this same point, you know, one of the cases cited in support of this is the Lorillard Tobacco Company v. Reilly case, which came down last spring or early this summer. The U.S. Supreme Court case, following Reilly within several weeks, denied review of the Carter case.

So, we think that the Carter instructions and the opinion from the Florida Supreme Court is not in any way inconsistent with Reilly or any of these cases.

THE COURT: And let the record reflect this Court finds the Florida Supreme Court very persuasive.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	28 November 2001
TIME:	Commencing at 2:40 p.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

MS. PARKER: One other thing, I know Your Honor has heard this, and I'm not going to address it in much detail, but the conflict pre-emption issue, you know, the United States Supreme Court has said that Congress has addressed this issue six times. And all six times that Congress addressed it, it says—Congress will enact these statutes—adverse health consequences of tobacco use were well known as were nicotine's pharmacological effects. All that we're hearing in the case, all Mr. Acosta's arguing, all of this that we're hearing this morning, it all goes to the nicotine in the cigarettes. Does nicotine have a pharmacological effect? Is nicotine addictive? And the Congress and the United States Supreme Court have said, "so what. That's not enough. They're legal even if they have health risks and even if they contain nicotine that has pharmacological effects."

The Supreme Court has said that's okay. So, there's got to be something else here, and we haven't heard it.

THE COURT: Well, I—I understand—I appreciate the argument of both counsel. Ultimately, I don't think in—clearly from what I recall, Mr. Kenyon did not testify that he was going to seek out an alternate type of product. Nonetheless, the fact that he switched products, I think is sufficient to overcome the motion for directed verdict. I want to make—I mean, you know, so you both can argue this again which undoubtedly will happen.

As I have read this over the last couple of days, I think ultimately where I come down on this issue is the mere fact he went from Camel to Salem is sufficient evidence to put the—to move this matter toward the jury on that issue.

MS. PARKER: I appreciate Your Honor letting me argue that. Thank you.

THE COURT: And I have also looked at your argument with regard to legal product. But I'm not sure how that—

how I'm—I'm not sure if I'm—I've yet to—I've yet to be convinced either way I ought to tamper with this Carter jury instruction. So, it—and—and it's—there's no question it's broader than the standard jury instruction, but by the same token, it—it does—it does address—I mean, and I don't—agree or disagree with it. We'll take record objections at the appropriate time, but it does address, I think the issues that this jury needs to consider in this case with regard to—if we're going to get to the end of case.

So, at this point, just so both sides know, if there is going to be specific requests on—to modify the Carter instruction, put it in writing and make it. But it's—who wants to start typing this up as it is?

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	28 November 2001
TIME:	Commencing at 9:00 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

BY MR. ACOSTA:

Q. Well, I'm asking you, isn't it true that Reynolds cannot demonstrate that the cigarette is safe for its intended use?

BY MR. TOWNSEND:

A. I think I just answered that question.

Q. Is it true, what I just said?

A. What I said—

Q. Well, you can—it's either true or it's not, and then you can explain it if you would like to. But I would just like to know if what I just said was true, that Reynolds cannot demonstrate that the cigarette is safe for its intended use?

A. In a general sense, that is a true statement.

Q. And one of the reasons you can't do that is because, as I believe you testified, that the cigarette is inherently dangerous?

A. That's exactly what I testified. There are inherent strong risks from any cigarette. No cigarette is safe. And further more there is no way if we develop a cigarette that completely eliminates the risks, for example, some modification of Premier or Eclipse, there is no way to definitively prove, given the science and lack of consensus about what test is appropriate in the scientific community. There's no way to prove that that cigarette would be completely safe. There is no safe cigarette.

* * *

BY MR. ACOSTA:

Q. Does Reynolds make a pack of 20 pieces of gum that it sells for a couple of bucks?

BY MR. TOWNSEND:

A. Of course not. I don't understand the point of the question.

Q. How much does a pack of nicotine gum cost?

A. I don't know.

Q. 25, 30, $40?

A. I have no idea.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendants.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	27 November 2001
TIME:	Commencing at 9:10 a.m.
REPORTED BY:	Sherrill Lynn Jackson, RPR Notary Public, State of Florida

* * *

BY MR. ACOSTA:

Q. And the Reynolds sales of cigarettes are several billion dollars a year, aren't they?

BY MR. TOWNSEND:

A. Yes.

Q. And so, over the last 40 or 50 years, the percentage spent on research and development is about one percent of Reynolds' sales; is that true?

A. I think that would be probably a reasonable guess plus—you know, it's within a few hundred million dollars.

Q. And the products that Reynolds designs and manufactures are the choice of Reynolds, aren't they?

A. I don't understand your question. What do you mean "choice"?

Q. Well, doesn't Reynolds choose to make the products it does?

A. We choose to make a number of products that we then put on the market. Ultimately, it's the consumer that makes the choice about whether they stay on the market.

* * *

BY MR. ACOSTA:

Q. You said cigarettes are risky; right?

BY MR. TOWNSEND:

A. Many times.

Q. In fact, I believe you testified there's no such thing as a safe cigarette?

A. I didn't say that yesterday. I have said that many times, and not just in court.

Q. And—so, Reynolds' position is, in fact, that there is no safe cigarette?

A. Absolutely. There is no safe cigarette. What we've tried to do at Reynolds, however, is reduce the risk. But we'll be the first to tell you there is no safe cigarette—completely safe.

Q. And—

MS. PARKER: Your Honor, may I have a cite?

THE COURT: You may.

BY MR. ACOSTA:

Q. Dr. Townsend, before I show this, can you tell me, when was it that Reynolds first concluded there was no safe cigarette?

A. I don't—

MS. PARKER: (Stands)

THE COURT: Before you do that, I'll allow the question. Let Ms. Parker have the cite.

MR. ACOSTA: I'm sorry. That went off by accident. Excuse me, Your Honor.

THE COURT: All right.

BY MR. ACOSTA:

Q. Dr. Townsend, when was it that Reynolds first concluded that there was no safe cigarette?

BY MR. TOWNSEND:

A. I don't know that there's a definite period where Reynolds said, "Oh, okay, now we understand that there is

no safe cigarette." Because if you go back in the history of Reynolds, it's clear in the records that scientists and management at Reynolds understood that cigarettes represent a major risk, particularly for lung cancer, but also for other diseases; and that stems out of the epidemiology that really came together in the very early '50s. There has been no debate that cigarette smoking is a risk for those diseases.

Q. So, your testimony is you don't know when Reynolds concluded that there is no safe cigarette? Is that fair to say?

A. That's essentially what I said. Understanding that I think, at least in my review of the history of Reynolds we understood the risks based on the epidemiology. We understood that cigarettes pose risks, and so, if you're asking me to define a particular time where we said, "There is no safe cigarette," you know, I'm not sure I can do that. Because the corollary to that understanding is that there is no safe cigarette.

Q. But it's safe to say today that Reynolds' position is there is no safe cigarette?

A. Absolutely.

Q. Never has been, has it?

A. Never has been—

Q. A safe cigarette?

A. I think that's fair to say. Cigarettes pose risks and our job has been to reduce those risks, and we've been successful.

Q. Okay. Let me show you a table of—when you discuss risks, you have to discuss it in terms of how risky it is, don't you?

A. I think it's important to know the relative risks, if you will, which is at least one measure. Now, I'm not an

epidemiologist either. You may be talking to the wrong witness. But I think it's important to know what the relative risk is or how risky it's—how risky smoking is compared to other risks for certain diseases.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	22 October 2001
TIME:	Commencing at 9:06 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

THE COURT: Well, I—that I'm not surprised about. What do—here's the question, though: What are you going to propose the jury instruction that goes back to the jurors on your negligence and strict liability? Because I think the defendant's position is, if I'm correct, that there's a bar that—that evidentiary if—by greater weight of the evidence, you're going to meet your negligence standard, and their contention is that because it's a product that's available to be sold, notwithstanding no—apparently no known risk or—I think you've got a certain evidentiary standard. Whatever do you think your evidentiary standard is?

Can [sic] you don't have to answer that now. You can think about it—I need you to come back here or are you just planning on using the standard instructions?

MR. ACOSTA: Yes, Your Honor. And the instruction that was approved by the Florida Supreme Court in Carter.

THE COURT: Well, the Carter instructions, I understand, but that doesn't go to this—my recollection of the Carter instruction was it didn't go to the issue—this particular issue.

MR. ACOSTA: Of conflict—what they claim is immunity. And then, in essence, they're asking you to direct a verdict on—

THE COURT: Well, no, they're asking me to direct a verdict, and I, obviously by—by trying—my opinion it's not a directed verdict issue. It could be if there's insufficient evidence, but it's a directed verdict issue than [sic] issue of what the standard of proof, which—

MR. ACOSTA: I guess I don't see it as a standard of proof issue at all. What I understood their jury instruction to say is that the Court now instructs you, the jury, that you cannot find the defendant negligent or strictly liable—I was just handed a copy—let's see, Mr. and Mrs. Kenyon were

required to prove by the greater weight of the evidence that there were feasible and demonstrably safe alternative design—I guess I jumped ahead of myself here—maybe I should start over a little slower.

It starts out "Ladies and gentlemen, I instruct you that Congress has determined that it is legal to Reynolds and its competitors to manufacture and sell and advertise cigarettes, notwithstanding the fact that cigarettes may be dangerous and addictive.

Accordingly, I hereby instruct you that no liability can be imposed upon Reynolds merely because it manufactured, sold, and advertised the cigarette that Mr. Kenyon allegedly smoked.

Therefore, there is only one remaining claim to consider under Mr. and Mrs. Kenyon's theories of negligence and strict liability. Mr. and Mrs. Kenyon's claim—and Mr. and Mrs. Kenyon's claim and were required to prove by the greater weight of the evidence that there was a feasible and demonstrably safer alternative design that Reynolds could have made available and that was not otherwise on the market and that Mr. Kenyon would have tried and continued to smoke the alternative design and that had Mr. Kenyon done so, he would have avoided entirely the illness of plaintiffs' claim were caused by his smoking." Well, I disagree with this in whole.

THE COURT: Well, I understand that. But I'm trying to find out what your instruction is going to be on the negligence and strict liability.

MR. ACOSTA: The standard jury instructions. Just the standard Florida jury instructions.

* * *

MS. PARKER: May I be heard on two issues relating to this? I just want to point out to the Court that the jury

charges used in Jones and in Carter was the test—the Court gave both a risk utility test and consumer expectations test. That's not the dispute that this proposed on conflict pre-emption goes to.

And also the conflict pre-emption cases from the Supreme Court came out after Carter, so they're not addressed in Carter and I just want to mention that. Also, I wanted to tell Your Honor this is a different—it would be a different charge, but it's very related to the conflict pre-emption and I wanted to go ahead and mention it to the Court, if I could hand this up and have a copy for Mr. Acosta.

As part of a tort reform act, which applies to this case because of the date of the cause of action, there is a—an additional defense that relates. It's the government rule defense and it goes right along with what we've been talking about with respect to conflict pre-emption, so we are going to be asking for a charge on this, and I wanted to go ahead and mention it to Your Honor in the context of discussions that we're having.

* * *

THE COURT: Right, I understand that. I'm just trying to address some of these issues.

MR. ACOSTA: Your Honor, I just—by my silence, I don't know want to waive any objection I have to this new government rule. I don't think it was pled.

THE COURT: I think it's safe to say that y'all don't agree on many issues, and so, if you sit there silent, I'll presume that you may not agree with everything that's being said.

* * *

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR HILLSBOROUGH COUNTY
CIVIL ACTION DIVISION

FLOYD J. KENYON, SR., and
FLORENCE KENYON, his wife,

Plaintiffs,

vs-

Case No. 00-5401
Division: "D"

R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,

Defendant.
----------/

TRANSCRIPT OF PROCEEDINGS

BEFORE:	THE HONORABLE HERBERT BAUMANN Circuit Judge
TAKEN AT:	Courtroom Number 1 Hillsborough County Courthouse Tampa, Florida
DATE:	9 October 2001
TIME:	Commencing at 9:05 a.m.
REPORTED BY:	Mary Elizabeth Blazer, RPR Notary Public, State of Florida

* * *

MS. PARKER: Your Honor, the second part of our summary judgment motion on pre-emption relates to the idea of conflict pre-emption.

And Your Honor may recall this is what got Schneider on the Hall case. And Your Honor did not rule on this issue. Your Honor reserved ruling and asked Mr. Schneider to permit a proposed jury charge on the issue to the Court. That's what happened in Hall.

Conflict pre-emption is really based on three cases. These are brand new cases, relatively brand new cases from the United States Supreme court. And that's why this issue was not addressed in some of these other tobacco cases that we all hear about. The case like the case down in Miami.

* * *

Again, I'm not asking for summary judgment on everything in the plaintiff's negligence and strict liability claims, I'm only asking for it on the claims that go to this generic attack on cigarettes, or this claim that Reynolds should be liable because we manufactured, sold and advertised our cigarettes knowing that there were health consequences or knowing pharmacological affects on nicotine.

That's just not enough. He has to show something else. And he can go to it and try to prove something else at trial, but he can't make the argument to the jury that we are liable in tort in Florida for what Congress and the United States Supreme Court has said.

Does Your Honor have any questions otherwise I'll wait.

THE COURT: Well, the reason I had asked when this argument was raised in Hall, the reason I had asked to see what you would propose or what—at that time your co-counsel would proposed as a jury instruction was so that I

could—I could see what you're suggesting is—is the—is this area and how it affects the plaintiff's burden. Because it seemed to me it wasn't—at the time, it seems to me it's not necessarily a summary judgment issue as much as a burden issue that's more appropriately addressed in jury instructions. And so that's why I asked for that. That's not to say I'm ruling upon your summary judgment, but which is to stay once I see that—

MS. PARKER: I'll be glad to submit that to Your Honor if we can get something to you. I would like to talk to the co-defendants of Hall maybe we submit it in both of cases. But I can submit something to you in a day or two.

THE COURT: That's fine. You can do that. And at that point, you know, Mr. Acosta not it cut you off on that issue, but I want to see that and then have you respond to what they suggest both as by way of jury instruction and this summary judgment issue. But it seems to me these arguments really don't for my duty—my burden in state court it seems to me this arguments would go more to a burden issue, that I need to instruct the jury on, not—not necessarily something that can be addressed—you know, I know these are Summary Judgments in federal court, but they are Summary Judgments standards somewhat different than mine, the standard that I have to apply.

* * *

IN THE CIRCUIT COURT FOR THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

FLOYD J. KENYON, SR. and FLORENCE KENYON, his wife,	)	
Plaintiffs,	)	Case No. 00-05401 Division D
v.	)	
R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation,	)	
Defendant.	)	

DEFENDANT R.J. REYNOLDS COMPANY'S PROPOSED JURY INSTRUCTIONS

* * *

NOT GIVEN OR REQUESTED IN CARTER

(New U.S. Supreme Court Case Law)

DEFENDANT'S PROPOSED INSTRUCTIONS NO. 17
Cigarettes Are A Legal Product

I instruct you that the manufacture of cigarettes is legal, and that cigarettes are a legal product.

AUTHORITY: Lorillard Tobacco Corp. v. Reilly, 121 S.Ct. 2404 (2001); FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291 (2000); See Fla. Stat. Ann. §§ 569.002, et seq.; 15 U.S.C. §§ 1331, et seq.

NOT GIVEN OR REQUESTED IN CARTER

(New U.S. Supreme Court Case Law)

DEFENDANT'S PROPOSED INSTRUCTIONS NO. 18
The Sale and Advertising of Cigarettes is Not Tortious Conduct
(Conflict Preemption)

I instruct you that Congress has determined that it is legal for Reynolds to manufacture, sell, and advertise cigarettes notwithstanding the fact that cigarettes may be dangerous and addictive. Accordingly, I hereby instruct you as a matter of law that Reynolds cannot be held liable to the plaintiffs merely because it manufactured, sold, and advertised the cigarettes that Mr. Kenyon allegedly smoked.

AUTHORITY: FDA v. Brown & Williamson Tobacco Corp., 120 S.Ct. 1291 (2000); Geier v. American Honda Motor Co., 120 S.Ct. 1913 (2000); Insolia v. Philip Morris Inc., 28 F. Supp.2d 1220 (W.D. Wis. 2000); Lorillard Tobacco Corp. v. Reilly, 121 S.Ct. 2404 (2001); Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608 (1992).

IN THE DISTRICT COURT OF APPEAL

SECOND DISTRICT
LAKELAND, FLORIDA

REYNOLDS TOBACCO COMPANY,	)	
Appellant,	)	SECOND DCA CASE NUMBER
v.	)	2D02-1667
FLOYD KENYON, SR. and FLORENCE KENYON, his wife	)	
Appellees.	)	

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES,
FLOYD J. and FLORENCE KENYON

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* * *

V. REYNOLDS IS NOT IMMUNIZED FROM LIABILITY BY THE CONFLICT PREEMPTION DOCTRINE.

Reynolds' fifth and final appeal argument is that it is immunized from responsibility for the harm its products caused to Mr. Kenyon by the doctrine of "conflict preemption." According to Reynolds, it cannot be held strictly liable for a defectively designed cigarette because "[b]y not banning or further regulating the design manufacture, and sale of cigarettes, Congress has determined that those activities are legal notwithstanding their well-known dangerous and addictive properties" (Reynolds Br., p. 46). In other words, Reynolds claims to possess a Congressional license, shared by no other industry, to manufacture and sell defectively designed, unreasonably dangerous products to the American public with total impunity—and complete immunity.[13]

One would assume that, before making such an extraordinary claim, Reynolds would have extraordinary authority to support it. Reynolds essentially has none. It relies on a United States Supreme Court decision which addresses preemption only peripherally and does not support its position, and three trial court level decisions, two of which do not involve strict liability and a third which does not even mention conflict preemption.

Moreover, Reynolds ignores decisions of the United States Supreme Court and the Florida Supreme Court which specifically identify the state law tort claims which are preempted by federal tobacco regulation, and a controlling decision of this Court which directly holds that strict liability

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[13] The Kenyons agree that this claim is reviewed *de novo* (*see* Reynolds Br., p. 40 n.15).

design defect claims against cigarette manufacturers are not preempted by federal law.

The preemption doctrine does not concern cigarette design but relates to restrictions on their advertising and promotion. The controlling decision on the preemption of state law tort claims against cigarette manufacturers is *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("*Cipollone*"). *Cipollone* adopted a straightforward test for determining whether a particular state law tort claim was preempted by federal regulation of the tobacco industry. It stated:

> The central inquiry in each case is straightforward: We ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion," giving that clause a fair but narrow reading.

505 U.S. at 523-24.

In *Carter*, *supra*, the Florida Supreme Court examined the preemption doctrine in the context of a judgment against a cigarette manufacturer based on negligence and strict liability. Relying on *Cipollone*, it held that claims relying on "testing or research practices or other activities unrelated to advertising and promotion" were not preempted, *Carter*, *supra*, 778 So.2d at 940, and affirmed the plaintiff's judgment.

In *Laschke v. Brown & Williamson Tobacco Corp.*, 766 So.2d 1076 (Fla. 2d DCA 2000) ("*Laschke*"), this Court specifically held that strict liability claims against cigarette manufacturers based on design defects are not preempted. *Laschke* also recognized that preemption is controlled by *Cipollone* and, following an analysis of that decision, concluded that claims for negligence and strict liability based

on design defects were not preempted. Specifically, this Court held:

> We therefore affirm summary judgment in favor of Appellees as to the Laschkes' post-1969 negligence and strict liability claims for failure to warn. We also affirm the post-1969 conspiracy to commit fraud through concealment claim insofar as the Laschkes' attempt to allege a duty beyond that imposed by the Labeling Act. The Laschkes' pre-1969 claims for failure to warn and conspiracy to conceal information **survive the motions for summary judgment, as do the negligence and strict liability claims based on design defects** and the conspiracy claims based on misrepresentations of material fact.

766 So.2d at 1078 (emphasis added).[14]

While it has not done so, any argument that Reynolds might make that these precedents are inapplicable because it is relying on "conflict preemption"[15] rather than express preemption has been expressly foreclosed by no less an authority than the United States Supreme Court—twice. First, it is expressly foreclosed in *Cipollone*, which held:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and

---

[14] Reynolds cites *Laschke* in a footnote, but solely for the proposition that the standard of review of its preemption claim is *de novo*. It does not mention its holding on preemption of strict liability design defect claims.

[15] Conflict preemption arises either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively or when state law is in actual conflict with federal law. *Freightliner Corporation v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) ("*Myrick*").

> when that provision provides a "reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

505 U.S. at 517 (citations omitted).

Cipollone further holds that there is "no general, inherent conflict between federal preemption of state warning requirements and the continued viability of state-common law damage actions." *Id.* at 518.

The Supreme Court had occasion to address this same issue a second time in *Myrick*, *supra*. In that case, the court of appeals had held that the just-quoted language from *Cipollone* amounted to a blanket holding that implied or conflict preemption could never exist when Congress had chosen to include an express preemption clause in a statute. While the Supreme Court held this was not a general rule, it specifically reiterated that: "In *Cipollone*, we did hold that the preemptive scope of the two statutes at issue was governed by the language in each Act." 514 U.S. at 287-288. In short, with respect to tobacco, the doctrine of conflict preemption may not be used to extend the preemption expressly provided by statute.

Reynolds purports to find support for its conflict preemption argument in the United State Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("*FDA*"). *FDA* concerned whether the United States Food and Drug Administration had the authority to regulate cigarettes as a "drug"; the Supreme Court held it did not. The only significant reference to preemption in the *FDA* opinion is the observation that Congress had preempted any further regulation of cigarette labeling. Since the regulation of product labeling is an integral aspect of the Food and Drug Administration's mandate, the Court cited this as supporting its conclusion

that Congress had not intended to grant this agency the authority to regulate cigarettes. Significantly, *FDA* also cites to and relies on *Cipollone*.

Reynolds' other "authority" is equally unpersuasive. *Insolia v. Philip Morris, Inc.*, 128 F.Supp.2d 1220 (W.D. Wisc. 2000) ("*Insolia*"), is a very unusual opinion. It does not involve strict liability, which the opinion notes had been previously removed from the case on an entirely different ground. The decision also acknowledges that it is virtually all *dicta*, as it is devoted to "refuting" a claim that the plaintiffs stated they were not making, namely that the sale and marketing of cigarettes was negligent *per se*. One of the several reasons given by the *Insolia* court for rejecting this non-existent claim was that it would purportedly have been preempted by federal law.

Whatever questionable authority *Insolia* may have does not apply to this case. The Kenyons are not seeking to ban Reynolds from selling cigarettes; they are seeking damages for the harm caused by Reynolds' defectively designed cigarettes.

Reynolds' next "authority," *DuJack v. Brown & Williams Tobacco Corp.*, No. X07-00728225-S (Conn. Super. Ct. 2001), consists of a fragment from what appears to be a trial transcript. Federal preemption is mentioned nowhere in this transcript; the only reference to preemption of any type is to a Connecticut statute which apparently limits causes of action against sellers of products in Connecticut to claims for product liability.

Reynolds' final authority, *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 2002 WL 1828380 (D.P.R. 2002) ("*Cruz*"), is also inapposite. Relying on *Insolia*, the *Cruz* court held that "plaintiffs are barred from pursuing a state law tort claim based exclusively on the theory that Defendant Reynolds manufactured and sold cigarettes." 2002 WL 1828380 at *7. The *Cruz* court plainly did not consider this ruling as having

anything to do with defective design claims, since these claims are discussed at length later in the same opinion. *See* 2002 WL 1828380 at *8-9.

Reynolds' conflict preemption argument represents a fitting conclusion to its brief. Like many of Reynolds' prior arguments, it is based on mischaracterization of the facts, and fails to cite, or even to acknowledge, adverse authority, including controlling adverse authority and adverse authority to which Reynolds was a party.

CONCLUSION

For the reasons stated, the Kenyons respectfully request that the judgment of the trial court be affirmed.

Respectfully submitted,

/s/

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DOCKET NO. X07-00728225-S	:	SUPERIOR COURT
ESTATE OF ARLENE B. DUJACK, ET AL	:	JUDICIAL DISTRICT OF TOLLAND
VERSUS	:	AT ROCKVILLE,
BROWN & WILLIAMSON TOBACCO CORPORATION	:	CONNECTICUT
	:	NOVEMBER 13, 2001

B E F O R E:

The Honorable Samuel Sferrazza
Superior Court Judge

AND A JURY

A P P E A R A N C E S:

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ORDER OF THE COURT

Shirley Gordon
Court Monitor

THE COURT: I'm not going to hold you in suspense. I'm going to grant the motion.

The Practice Book allows, on motions for directed verdict, to reserve a judgment, and there are advantages and disadvantages to each. An advantage of reserving the judgment is that you allow the jury to decide the case, and if the evidence is as poor as the judge might think, in the usual case, where evidence is a problem—the absence of evidence is a problem, then if the judge is wrong, an appellate court can simply reinstate the verdict and not have to try to case over again. And issues of adequacy of evidence are often in the mind of the beholder, what inferences are proper and improper, things of that nature.

The disadvantage, of course, is that the parties have to expend money and time and witnesses are called and inconvenienced by it, and so that's balancing. The appellate court has recommended that you reserve judgment in the usual case.

There is an exception, however, and that, I believe, is in a case where it's not the inadequacy of the evidence that causes the Court to consider a directed verdict, but rather the inadequacy of the claim. That is, assuming all the facts, the claim is true, the claim does not set out a viable cause of action which can impose liability on a defendant. In that case, you don't gain anything by reserving judgment. The judge will not give proper instructions to the jury, because the judge, if mistaken, is going to give improper instructions, and charge the matter out of the case anyway, so there's noting to be gained by reserving it. And I believe that's the case we have here.

I'm going to assume, for purposes of this motion, that certain facts are true, that Arlene DuJack did smoke Kool cigarettes, that she became addicted to Kool cigarettes at an early age, that this addiction did her harm, and that the

cigarette smoking that she did caused her lung cancer, and the other injuries that resulted from having the lung cancer.

This is case is brought, as it must be, on a product liability theory. Section 52-572n of our statutes preempts all other bases for causes of action for liability against sellers of products for harm caused by that product. So the only theory that can be pursued is product liability.

Manufacturers and sellers are not, however, absolutely liable for their products. They are not insurers or guarantors of the purchaser's safety. Our Supreme Court has adopted Section 402a of the Restatement Second of Torts, and that requires that the product that was sold must be, quote, "In a defective condition, unreasonably dangerous to the user or consumer," unquote, in order for liability to attach.

We've adopted that early on, and the adoption of that standard was reiterated in Potter versus Chicago Pneumatic Tool Company. That's—pneumatic is p-n-e-u-m-a-t-i-c. It's 241 Connecticut 199, page 214. It was a 1997 case.

Here, there is no claim of a manufacturer's malfunction or error. These cigarettes—the Kool cigarettes that were smoked were manufactured, as they were designed to be manufactured. That's not the claim here. And when that's the situation, where the product is made, the outcome of the product is exactly as the manufacturer intended, then the defect, if any, must be a design defect.

And, again, what we're dealing with here—we have to ascertain what we're not dealing with. We're not dealing with mis-labeling or false advertisement. Those, Judge Bishop, I think, has ruled federally preempts this area, with regard to cigarettes.

We're not dealing with any claim that Kool cigarettes have some peculiar manufacturing process with filters or their papers or any additives or any genetic processing that makes Kool cigarettes different than any other cigarette.

The claim here—the claimed defect here is that Kool cigarettes have nicotine in them. Normally, if you have a design defect, you get into an analysis of consumer expectations, standards, and one factor of that is risk utility. And the Potter case describes that in great detail. But that analysis, in my determination, is inapplicable where the defect claimed in inherent in the product to be sold. It's the unavoidable danger that was discussed in Comments I and Comments K to 402-A.

I should point out that both of those comments, Comment I was adopted by our Supreme Court in Wagner versus Clark Equipment Company, 243 Connecticut 168, a—I believe that's a 1997 case, also, and I think it was at page 198, I'm not sure of that citation. Page 189.

And Commentary K—Comment K was adopted in Vitanza, V-i-t-a-n-z-a, versus Upjohn Company. That's a 2001 case. The citation there is Volume 257 of the Connecticut Reports, 365 at page 374, and it's set forth in one of the footnotes to that case.

What is a cigarette? Well, a cigarette is a nicotine delivery device That's what its purpose is for. That's where the pleasure is derived. We heard from a toxicologist and also the addictionologist, and they both indicated that. The pleasure—the usefulness of this product, if we can use that word, usefulness,—I should probably say the desired effect of the product, the exhilaration, the relaxation, the stimulation, is garnered from the nicotine. Unfortunately, that's what is—causes addiction and lung cancer and other diseases, the presence of nicotine.

You can't claim that gasoline is defective because it's very dangerous, which it is, because it's highly flammable. It's purpose is for combustion. It must be highly flammable; and, therefore, you don't get into consumer expectation questions on that. The product, inherently, must be highly flammable to be gasoline.

It was pointed out in the argument by defense counsel, similarly true with recreational activities such as consuming liquor. Liquor—vodka would not be vodka if it doesn't have grain alcohol in it. It's consumed, it's designed to permit the ingestion of alcohol for whatever pleasurable effects the alcohol has. Unfortunately, it has very great and dangerous side effects. But, as a matter of law, you cannot claim that vodka is defective because it contains grain alcohol.

And, likewise, you cannot make a claim that cigarettes are an unreasonably dangerous or defective product because the nicotine in them causes harm.

Comment I to the Restatement Tort Second—and I'm quoting from it here—quote, "Good tobacco,"—and by good, I think they mean unadulterated, not poisoned, not containing insecticides or other products—"Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful."

And in Comment K, that states, quote, "There are some products which, in the present state of human knowledge, are quite incapable of being more safe,"—let me quote it rather than trying to read my own scribbling. "There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." And it goes on, later on, "Such a product, properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous despite the fact that it has this inherent propensity to cause harm."

Now, judges and juries cannot engage in the enterprise of determining which activities, which enterprises, are socially worthy, and which are not. In actuality, the claim here is not that Kool cigarettes, in particular, are defective, but that all cigarettes are defective. The plaintiff's claims are concerning the presence of nicotine, and it is an attack on the

activity of smoking, and the enterprise of manufacturing tobacco cigarettes.

The manufacture, sale, possession and consumption of tobacco cigarettes are a legal activity. Judges and courts cannot ban them, nor impose liabilities, merely for engaging in that activity of smoking, selling and using cigarettes.

Whether cigarettes are a product that are [sic] so dangerous that the social benefits derived from it are not worth the social costs, are not a judicial decision. Those are legislative decisions, for state or federal legislatures, under constitutional strictures.

Based on that, I'm holding that the claim in this case is not a viable one for imposing liability on the defendants, even if all the factual allegations that were permitted are true.

I'm going to indicate that my comments will be transcribed under Practice Book Section 64-1 for purposes of my signature, and for purposes of appeal.

We need to bring the jury in, and I'm going to direct the verdict.

The loss of consortium claim is, of course, derivative, and therefore, it, too, must be directed.

/s/
Sferrazza, Judge

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RJRTH 2003-??

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RJR and BAT Agree to Combine U.S. Assets and Operations

WINSTON-SALEM, N.C.–Oct. 27, 2003–R.J. Reynolds Tobacco Holdings, Inc. (NYSE: RJR) and British American Tobacco p.l.c. (AMEX: BTI) today announced the signing of a definitive agreement to combine the assets and operations of their respective U.S. tobacco businesses: R.J. Reynolds Tobacco Co. (RJRT) and Brown & Williamson Tobacco Corp. (B&W).

The agreement provides for establishing a new publicly traded holding company, Reynolds American Inc., with approximately 150 million shares outstanding. BAT will own 42 percent of Reynolds American Inc. through B&W with existing RJR shareholders owning 58 percent through a one-for-one exchange for stock of the new company. The company expects the transaction to be tax-free to RJR shareholders and to BAT.

The agreement provides for B&W to transfer to RJRT all Master Settlement Agreement liabilities and the corresponding cash balance to cover previously accrued payment obligations. The amount is contingent on the timing of closing the transaction, but averages approximately $750 million during the year. RJR Tobacco will indemnify B&W for all existing and any future litigation relating to its

U.S. business. In addition, the contributed assets of B&W included in the agreement will be debt-free.

RJR will pay BAT $400 million in cash to acquire the stock of Lane Limited, a subsidiary that manufactures several cigar, roll-your-own and pipe tobacco brands and distributes Dunhill tobacco products.

The transaction is expected to close in mid-year 2004, pending the necessary approvals from U.S. regulatory authorities and RJR shareholders, as well as Internal Revenue Service rulings.

The combination will consolidate the second and third largest U.S. tobacco companies. On a combined 2002 basis, Reynolds American Inc. would have annual revenues of approximately $10 billion, annual domestic cigarette volume of 136 billion units, and over 30 percent of the cigarette sales in the United States.

"This agreement marks a milestone for both companies," said Andrew J. Schindler, chairman and CEO of RJR. "The combination of these companies will enable us to achieve tremendous efficiencies, and will greatly enhance our ability to compete effectively in the U.S. market. The merger is expected to be accretive to earnings and provide outstanding value and return to shareholders. RJR and BAT recognize the mutual benefits of this combination and share a strong desire to complete the deal," said Schindler.

"This exciting combination makes both strategic and financial sense," said Martin Broughton, chairman of BAT. "This merger will improve our competitive position in the most important cigarette market in the world. It gives the Group a 42 percent share in a stronger and more sustainable business with an enhanced brand portfolio."

"We believe that the merger is the best way to achieve our long-term strategic ambitions in the U.S. market, while

improving both our earnings per share and our cash flow in the first full year following completion," Broughton said.

The companies have agreed to a multi-year contract for BAT's export product currently produced by B&W to be manufactured by R.J. Reynolds Tobacco. BAT will retain the rights to use all its international trademarks outside the United States.

After the transaction closes, the full integration of B&W's operations into RJRT, including the sales forces, manufacturing operations, and other areas, is expected to take 18 to 24 months. The company plans to consolidate headquarters and operations in Winston-Salem, N.C. The full integration of the companies is anticipated to generate more than $500 million in annualized savings.

Schindler will serve as executive chairman of Reynolds American Inc. for a six-month period after closing and then as non-executive chairman. Susan Ivey, currently president and CEO of B&W, will serve as president and CEO of Reynolds American Inc. Announcements regarding the balance of the executive management team will be made at a later date.

The new board of Reynolds American Inc. will consist of 13 members, including Schindler and Ivey, six directors from the existing RJR board and five directors designated by BAT (three independent and two BAT executives). BAT will receive the rights typically afforded a substantial minority shareholder.

RJR intends to continue paying its annualized $3.80 dividend. Under terms of the agreement, the designated Reynolds American management will recommend to the new board an annual dividend payout policy of approximately 75 percent of net income. After closing, the practical implications of the 42 percent ownership by BAT are likely

to preclude substantial share repurchase programs by Reynolds American Inc.

The agreement includes a 10-year "standstill" provision that generally prevents BAT from buying shares that would increase its holding above 42 percent of the outstanding Reynolds American Inc. stock. Certain limits are also placed on BAT's ability to sell its stock in the new company.

In addition to the combined RJRT, Santa Fe Natural Tobacco Company and Lane Limited will operate as independent subsidiaries of the new holding company.

RJR was advised on the transaction by Lehman Brothers Inc., and J.P. Morgan Securities Inc.

Additional Information and Where To Find It

Reynolds American Inc., the holding company to be formed in the proposed business combination, intends to file a registration statement on Form S 4 that will include a proxy statement/prospectus and other relevant documents in connection with the proposed business combination. INVESTORS AND SECURITY HOLDERS OF R.J. REYNOLDS TOBACCO HOLDING INC. ("RJR") ARE ADVISED TO READ THESE DOCUMENTS WHEN THEY BECOME AVAILABLE, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED BUSINESS COMBINATION. Investors and security holders may obtain a free copy of the prospectus/proxy statement (when it becomes available) and other documents filed by RJR and Reynolds American Inc. with the SEC at the SEC's web site at http://www.sec.gov. Free copies of the prospectus/proxy statement, when it becomes available, as well as RJR's and Reynolds American Inc.'s related filings with the SEC, may also be obtained from RJR by directing a request to R.J. Reynolds Tobacco Holdings, Inc. at P.O. Box 2866, Winston-Salem, NC 27102 2866, Attn.: Office of

Investor Relations, or by telephone at (336) 741 5165 or on RJR's website, www.RJRHoldings.com.

Forward-Looking Information

Statements included in this news release which are not historical in nature are forward-looking statements made pursuant to the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. Although RJR believes that these expectations are based on reasonable assumptions, it can give no assurance that the business combination, if consummated, will be successful or that other expectations will be realized. Factors that could affect whether the transaction is completed include the satisfaction of all conditions to the business combination that cannot be waived and the satisfaction or waiver of all other conditions, including those described above. Factors that could affect the future performance of Reynolds American Inc. following completion of the transaction, include the substantial and increasing regulation and taxation of the cigarette industry; various legal actions, proceedings and claims arising out of the tobacco business and the claimed health effects of cigarettes that are pending against RJRT or B&W or may be instituted against Reynolds American Inc. or its subsidiaries; the substantial payment obligations and limitations on the advertising and marketing of cigarettes under various litigation settlement agreements; the continuing decline in volume in the domestic cigarette industry; competition from other cigarette manufacturers, including increased promotional activities and the growth of the deep-discount category; the success of new product innovations and acquisitions; the effect of market conditions on the performance of pension assets and the return on corporate cash; any potential costs or savings associated with realigning the cost structure of Reynolds American Inc. and its subsidiaries and otherwise realizing synergies from the combination of RJRT and B&W; and the ratings of RJR's securities. Except as required by the federal securities laws,

we undertake no obligation to publicly update or revise any forward-looking statement, whether as a result of new information, future events or otherwise.

Interests of Participants

RJR, its directors and executive officers and certain other members of management and employees may be deemed to be participants in the solicitation of proxies from RJR stockholders in favor of the proposed business combination. A description of the interests of the directors and executive officers of RJR is set forth in RJR's proxy statement for its 2003 annual meeting, which was filed with the SEC on March 19, 2003. Investors and security holders may obtain additional information regarding the interests of such potential participants in the proposed business combination by reading the prospectus/proxy statement and the other relevant documents filed with the SEC when they become available.

In addition, since the referenced proxy statement, Robert S. (Steve) Miller Jr. was elected to the board of directors of RJR. As of Oct. 27, 2003, Mr. Miller was the beneficial owner of 1,000 shares of RJR's common stock, which does not include 10,000 shares issuable upon the exercise of stock options held by him that are exercisable on or after Jan. 1, 2004. If the proposed business combination is consummated, Mr. Miller's options will be immediately exercisable. Additional information regarding Mr. Miller and any interests he may have in the proposed business combination will be set forth in the prospectus/proxy statement and other relevant documents filed with the SEC when filed with the SEC.

R.J. Reynolds Tobacco Holdings, Inc. is the parent company of R.J. Reynolds Tobacco Company and Santa Fe Natural Tobacco Company, Inc. R.J. Reynolds Tobacco Company is the second-largest tobacco company in the United States, manufacturing about one of every four

cigarettes sold in the United States. Reynolds Tobacco's product line includes four of the nation's 10 best-selling cigarette brands: Camel, Winston, Salem and Doral. Santa Fe Natural Tobacco Company, Inc. manufactures Natural American Spirit cigarettes and other tobacco products, and markets them both nationally and internationally. Copies of RJR's news releases, annual reports, SEC filings and other financial materials are available on the company's website, www.RJRHoldings.com.

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